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Supreme Court, U.S.
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No. 04-1134

# In the Supreme Court of the United States

LINDA METRISH, WARDEN,

*Petitioner*,

v.

DARRIN T. HATCHETT,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

I. Where the Order of the Wayne County Juvenile Court Waiving the Court's Jurisdiction and Transferring the Respondent's Delinquency Prosecution to the Adult Criminal Court Was, Under Michigan Law, a Final Judgment Directly Appealable by Right to the Wayne Circuit Court; and Where Retained Counsel's Failure to Timely Pursue a Direct Appeal of the Waiver Decision Forfeited the Appeal Under Michigan Law Because Legal Challenges to the Waiver Decision Could Not Be First Asserted in the Respondent's Appeal from His Conviction in the Adult Criminal Court; the United States Court of Appeals for the Sixth Circuit Correctly Held, Pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), That the Respondent, to Establish Ineffective Assistance of Appellate Counsel Justifying the Issuance of the Writ, Need Not Prove There Was a Substantial Probability He Would Have Prevailed in His Appeal of the Juvenile Court's Order Waiving Jurisdiction, but Need Only Show He Wanted to Appeal, Retained an Attorney to Appeal, and the Attorney Never Filed the Appeal.

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## COUNTER-STATEMENT OF THE CASE

Respondent Darrin T. Hatchett (hereinafter "Respondent" or "Mr. Hatchett") was involved in the shooting death of a friend on December 29, 1986, when Respondent was 15 years, 3 months old. The Respondent was a juvenile under Michigan Law at the time of this incident, so the Wayne County Prosecuting Attorney commenced delinquency proceedings against Respondent in the Juvenile Division of the Wayne County Probate Court (hereinafter: "Juvenile Court"). Hearings were held on January 20 and March 10, 1987 to determine whether the Juvenile Court should waive jurisdiction over Mr. Hatchett, and Order this case transferred to the appropriate adult felony court, the Recorder's Court for the City of Detroit (hereinafter: "Recorder's Court"). Following these hearings, the Juvenile Court issued an Opinion and Order waiving its jurisdiction, and transferring this case to the Recorder's Court. (See Petitioner's Appendix, at 78a-83a).

The Petition for Writ of Certiorari (hereinafter: "The Petition") filed by the Michigan Attorney General on behalf of Petitioner Warden Linda Metrish (hereinafter: "Petitioner"), erroneously describes the events which followed the Juvenile Court's waiver of jurisdiction, as follows: "The late Charles Campbell was then appointed to represent Respondent." (Petition, at 4). This is inaccurate. Attorney Charles Campbell was not appointed to represent Mr. Hatchett by any court, but was retained by Mr. Hatchett's family to both represent him on the pending felony charges in the Recorder's Court for the City of Detroit, and to appeal the Juvenile Court's Order Granting Waiver to the Wayne County Circuit Court. The Opinion of the United States Court of Appeals for the Sixth Circuit (hereinafter: "Sixth Circuit") describes these facts correctly as follows:

> Hatchett retained attorney Charles Campbell to represent him after the waiver hearing. Campbell represented Hatchett at the preliminary examination in state district court, but he did not appeal the juvenile court's decision to waive jurisdiction.... (Petitioner's Appendix, at 3a).
>
> The record in this case does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Hatchett's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in the state district court, stating that this was a waiver from juvenile court and "[w]e have to study all of that and consider our options there and here..." Later, however, he agreed to proceed with the preliminary examination. Because Hatchett's uncle retained counsel to appeal, it is clear that Hatchett would have appealed. (Petitioner's Appendix, at 6a)

The Respondent was then convicted as an adult of two charges following a trial in the Recorder's Court: Second-Degree Murder and Possession of a Firearm During a Felony. He was sentenced to life in prison, plus two years. The Respondent was represented on direct appeal from his Recorder's Court criminal convictions to the Michigan Court of Appeals by a Court-Appointed appellate attorney, Mr. Roman Karwowski, who challenged on appeal the sufficiency of the evidence to sustain the convictions and also argued that the sentence was excessive under Michigan Law (Opinion and Order Denying Habeas Corpus Petition, (hereinafter: "District Court Opinion"), Petitioner's Appendix, at 8a-9a).

Attorney Karwowski did not and could not have raised any challenge to the Juvenile Court Order waiving jurisdiction over Mr. Hatchett to the Recorder's Court in the appeal he filed on behalf of Mr. Hatchett in the Michigan Court of Appeals, because Michigan law required that the Juvenile Court decision to waive jurisdiction must first be appealed directed to the county circuit court, in this case, the Wayne County Circuit Court. The failure of attorney Charles Campbell to file such a direct appeal of the Juvenile Court Order waiving jurisdiction in the Wayne County Circuit Court, which Attorney Campbell had been specifically retained to do, forfeited Mr. Hatchett's legal right to appeal the Juvenile Court Order. Mr. Hatchett's right to appeal and challenge the decision of the Juvenile Court to transfer jurisdiction over this case to the Recorder's Court, a right protected by Michigan Law, was therefore lost as a result of Attorney Campbell's failure to file the appeal that he had been hired to pursue.

Ultimately, Mr. Hatchett initiated further post-conviction proceedings arguing, *inter alia*, that he had been deprived of the effective assistance of appellate counsel by Attorney Campbell's failure to appeal the decision of the Juvenile Court to waive jurisdiction to the Recorder's Court. This claim was properly pursued through the state courts of Michigan, and was then the subject of a Petition for Habeas Corpus filed in the United States District Court, commencing the instant proceedings. (See District Court Opinion, Petitioner's Appendix, at 9a-11a). The District Court denied relief, finding that Mr. Hatchett had failed to establish that, even if Attorney Campbell had filed and pursued an appeal in the Wayne Circuit Court from the Juvenile Court Order waiving jurisdiction over Mr. Hatchett, that there was a "reasonable probability that, but for [Attorney] Campbell's failure to appeal the probate court's decision, the result of the

proceeding would have been different." (District Court Opinion, Petitioner's Appendix, at 23a).

Mr. Hatchett appealed to the Sixth Circuit, arguing that the District Court had applied the wrong legal standard in light of *Roe v Flores-Ortega*, 528 U.S. 470 (2000). The Sixth Circuit agreed, reversed the District Court, and specifically found, based upon *Flores-Ortega, supra*, that "prejudice is presumed from counsel's failure to file a Notice of Appeal when requested by his client." (Sixth Circuit Opinion, Petitioner's Appendix, at 6a)

The Petition filed in this case by the Michigan Attorney General misinforms this Court, and mischaracterizes the appellate remedy provided in Michigan Law for Mr. Hatchett to challenge the Juvenile Court's waiver of jurisdiction. The Attorney General's Petition repeatedly and erroneously refers to such an appeal as an "Interlocutory Appeal." (See Petition, at i, ii, 5, 6, 7, 10, 11, 13). This is completely wrong. The applicable Michigan statutes (Respondent's Appendices, A, B, and C) establish a right of direct review from a Juvenile Court order waiving jurisdiction over a juvenile accused of a serious delinquent act, to the appropriate county circuit court.

This is the only avenue of appellate review provided for such an order. Controlling Michigan cases which both precede and follow the Juvenile Court proceedings in Mr. Hatchett's case have clearly established that any challenge to the waiver of jurisdiction by the Juvenile Court could not be first raised in the Michigan Court of Appeals during Mr. Hatchett's appeal from his convictions in the Recorder's Court, because the failure to first take an appeal of right to the county circuit court forfeits the right to appeal the Order of the Juvenile Court. If such an appeal were an "interlocutory appeal," then there would be no bar to raising

such issues on direct appeal from the convictions in the adult felony court. Thus, it is completely erroneous to refer to an appeal of the Juvenile Court's waiver decision as an "Interlocutory Appeal."

Further, the Petition in this case also mischaracterizes the opinion of the Sixth Circuit (Petitioner's Appendix, at 2a-7a) in this case as representing an unwarranted expansion of *Flores-Ortega*, *supra*. (See Petition, at 7-8, 10, 16). This is an erroneous interpretation of the Sixth Circuit's Opinion. The Sixth Circuit did not expand *Roe v Flores-Ortega*, but simply appropriately and logically applied that decision to the facts of the instant case. This Court in *Flores-Ortega*, *supra,* concluded that a defendant who asserts he was deprived of his right to appeal altogether by the ineffective assistance of appellate counsel need not establish a reasonable probability that he would have prevailed on the appeal; the same reasoning should clearly apply to this case.

Since, under Michigan law, the appeal from a Juvenile Court decision to waive jurisdiction over a juvenile accused of a serious delinquent act to the appropriate adult felony court is not an Interlocutory Appeal, but it is a separate appeal of right which must be pursued or it is forfeited, the reasoning and logic of *Flores-Ortega*, *supra*, should clearly apply. The Sixth Circuit correctly applied the rule established by *Flores-Ortega*, *supra,* to this case, and therefore there is no need for this Court to grant Certiorari and address this case. If this Court should see fit to grant Certiorari, the Judgment of the Sixth Circuit should be affirmed.

## REASON'S FOR DENYING THE WRIT

**I. Where the Order of the Wayne County Juvenile Court Waiving the Court's Jurisdiction and Transferring the Respondent's Delinquency Prosecution to the Adult Criminal Court Was, Under Michigan Law, a Final Judgment Directly Appealable by Right to the Wayne Circuit Court; and Where Retained Counsel's Failure to Timely Pursue a Direct Appeal of the Waiver Decision Forfeited the Appeal Under Michigan Law Because Legal Challenges to the Waiver Decision Could Not Be First Asserted in the Respondent's Appeal from His Conviction in the Adult Criminal Court; the United States Court of Appeals for the Sixth Circuit Correctly Held, Pursuant to *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), That the Respondent, to Establish Ineffective Assistance of Appellate Counsel Justifying the Issuance of the Writ, Need Not Prove There Was a Substantial Probability He Would Have Prevailed in His Appeal of the Juvenile Court's Order Waiving Jurisdiction, but Need Only Show He Wanted to Appeal, Retained an Attorney to Appeal, and the Attorney Never Filed the Appeal.**

### A. An Appeal from a Michigan Juvenile Court Order waiving jurisdiction over a juvenile is not an "Interlocutory Appeal."

#### 1. In Michigan, a Juvenile has an appeal of right from a Juvenile Court Order waiving jurisdiction.

The Petition for Writ of Certiorari filed in this case repeatedly and erroneously mischaracterizes the appellate procedures provided in Michigan to juveniles who wish to

challenge on appeal a decision by the Juvenile Court to waive jurisdiction over them to the appropriate adult felony court. Under Michigan law, an Order of a Juvenile Court waiving jurisdiction over a juvenile charged with a serious delinquent act to the appropriate adult felony court is a final Order of that Court, appealable by right to the circuit court for the county where the Juvenile Court sits. If the appeal of right is not pursued in a timely manner, the right to raise a legal challenge to the waiver decision of the Juvenile Court is forfeited and lost forever. This procedure does not fit the definition of an: "Interlocutory Appeal." The phrase "Interlocutory Appeal" is used to refer to appeals taken prior to the final judgment of the case, where the appellant requests a higher court to exercise its discretion, and review an interlocutory order, based upon a belief that the progress of the litigation will be expedited or advanced if a particular issue or issues are decided before trial.

Pursuant to Michigan statutes which were in effect at the time of Mr. Hatchett's case, and which are still in effect today, an appeal of a Juvenile Court Order waiving jurisdiction is *not* an Interlocutory Appeal; it is an appeal from a final judgment issued by the Juvenile Division of the county Probate Court. The time limitations and other requirements for appealing from a final judgment must be met, or the juvenile's legal right to appeal the Juvenile Court's decision to waive jurisdiction is forfeited.

The mischaracterization of this procedure in the Petition is particularly unfortunate and troubling, since the Opinion of the District Court in this matter accurately describes Michigan Law on this very point, as follows:

> A juvenile was entitled to an appeal of right in circuit court from the probate court's waiver of jurisdiction.

> *People v Jackson*, 171 Mich App 191, 195-96; 429 N.W. 2d 849, 852 (1988). After the deadline for filing a claim of right expired, he could apply for leave to appeal in the circuit court. *Id.*, 171 Mich App at 196; 429 N.W. 2d at 852. *Failure to appeal the juvenile court's decision to waive jurisdiction barred review of the issue in the Michigan Court of Appeals. Id.*; *People v Mahone*, 75 Mich. App. 407, 410; 254 N.W. 2d 907, 909 (1977). (District Court Opinion, Petitioner's Appendix, at 23a)(emphasis supplied).

The District Court clearly and correctly understood that Attorney Campbell, who was retained to represent Mr. Hatchett after the Juvenile Court waived jurisdiction over him to the Detroit Recorder's Court, forfeited Mr. Hatchett's ability to challenge the decision of the Juvenile Court by not timely pursuing an appeal to the Wayne Circuit Court from the Juvenile Court Order waiving jurisdiction. The District Court went on to point out:

> Attorney Charles Campbell did not appeal the juvenile court's waiver of jurisdiction, and his failure to do so precluded Petitioner from raising the issue in the Michigan Court of Appeals. *Jackson*, 171 Mich. App. at 195; 429 N.W. 2d at 852. Petitioner alleges that Campbell squandered his best chance at avoiding exposure to a life sentence. [footnote omitted] (District Court Opinion, Petitioner's Appendix, at 16a).

The District Court Opinion also describes the facts in the record supporting Mr. Hatchett's contention that attorney Campbell was in fact hired to appeal the final judgment of the Juvenile Court waiving jurisdiction over Mr. Hatchett, as follows:

> The record does not indicate why Campbell did not appeal the juvenile court's waiver of jurisdiction. One of Petitioner's uncles has indicated in an affidavit that he and his brother retained Campbell to appeal the juvenile court's waiver of jurisdiction. Campbell moved to adjourn the preliminary examination in state district court, stating that this was a waiver from juvenile court and "[W]e have to study all of that and consider our options there and here..." (Tr. Mar. 23, 1987, at 3). Later, however, he agreed to proceed with the preliminary examination. (District Court Opinion, Petitioner's Appendix, at 16a).

Thus, the Petitioner, by mischaracterizing the procedures in Michigan governing an appeal from a Juvenile Court Order waiveing jurisdiction over a juvenile accused of delinquent acts, inappropriately minimizes the legal effect of the deficient performance of attorney Campbell in failing to file and pursue such an appeal.

2. <u>The Attorney appointed to represent the Respondent after his conviction in the adult criminal court could not have challenged the Juvenile Court Order waiving jurisdiction.</u>

The Petitioner further misleads this court by inaccurately stating that after Mr. Hatchett was convicted and sentenced in the adult felony court, the attorney who represented him on appeal from his convictions in the Recorder's Court could have, in that appeal, challenged the decision of the Juvenile Court to waive jurisdiction. The Petition erroneously states:

> Furthermore, Respondent was afforded new counsel on appeal from his conviction, who was able to review the record to determine if there was an issue of

ineffective assistance of counsel that caused his client actual prejudice. (Petition, at 8).

This statement is completely wrong, for several reasons. First, Mr. Karwowski, the attorney assigned to represent Mr. Hatchett after his conviction in the Recorder's Court, would not have been able to challenge the order of the Juvenile Court to waive jurisdiction over Mr. Hatchett because, as pointed out by the Opinion of the District Court in the excerpts quoted, supra, Michigan law establishes that the failure to pursue a direct appeal of the Juvenile Court decision to the county circuit court "precludes the defendant from raising the issue again in the Michigan Court of Appeals." (District Court Opinion, Petitioner's Appendix, at 16a).

In addition, the appellate attorney representing Mr. Hatchett following his convictions in the Detroit Recorder's Court, was appointed by the Detroit Recorder's Court; s/ he would not have been able to obtain copies of the records and transcripts of the proceedings in the Juvenile Court at Court expense. In Michigan, in the vast majority of cases, the Court whose Judgment is being challenged is the Court that appoints counsel for an indigent defendant. Individual courts jealously guard the prerogative to appoint counsel.

Had attorney Campbell properly filed an appeal from the Juvenile court's decision to waive jurisdiction, the appeal would have gone to the Wayne County Circuit Court, and been heard in a separate court by a separate Judge from the Judge assigned to preside over the adult criminal prosecution in the Detroit Recorder's Court. Further, attorney Campbell, as retained counsel, would have had to pay the necessary costs to the Juvenile Court Reporter and to the Juvenile Court Clerk to obtain copies of the transcripts and the records.

Had the Wayne County Juvenile Court assigned counsel to represent Mr. Hatchett on appeal from its decision to waive jurisdiction, the Juvenile Court would have provided its own Court-assigned attorney with copies of the transcripts and court records at court expense. However, Attorney Roman Karwoski, the attorney who was assigned by the Detroit Recorder's Court to represent Mr. Hatchett on appeal after his trial in the adult felony court (Sixth Circuit Opinion, Petitioner's Appendix, at 3a), would not have been provided transcripts and records from the Juvenile Court at Court expense, because he was not appointed by that Court.

Further, by the time Mr. Karwowski was assigned to represent Mr. Hatchett on appeal from his convictions in the Detroit Recorder's Court, the time limit for filing an appeal of right from the Juvenile Court waiver decision had long expired. This is made clear both by the District Court's Opinion, supra, and by the applicable Michigan statutes which provide for appeals from decisions of the County Probate Court. MCL 600.861; MSA 27A.861 (attached as Appendix A), provides that certain decisions of the Michigan Probate Courts can be appealed directly to the Michigan Court of Appeals. Importantly, a decision of the Juvenile Division of the Probate Court to waive jurisdiction over a juvenile accused of delinquent acts is *not* among the decisions that can be appealed directly to the Michigan Court of appeals. MCL 600.863; MSA 27A.863 (attached as Appendix B), provides that:

> "a person aggrieved by an order, sentence, or judgment of the probate court other than an order appealable under section 861 (MCL 600.861; MSA 27A.861, *supra*), may appeal to the circuit court in the county in which the order, sentence or judgment is rendered."

Such an appeal is on the Juvenile Court record, and is not *de novo*. MCL 600.866; MSA 27A.866 (attached as Appendix C).

Thus, appeals of Orders of the Juvenile Court waiving jurisdiction over juveniles accused of delinquent acts must go to the county circuit court for the county where the probate court was sitting. At the time Respondent's case was heard, the adult felony court which acquired jurisdiction over Mr. Hatchett following the waiver of jurisdiction by the Juvenile Division was the Detroit Recorder's Court. This is a separate Court, with different Judges, who would not have had jurisdiction to entertain the appeal from the Juvenile Court's waiver of jurisdiction; such an appeal had to be filed in the Wayne Circuit Court.

3. The failure of the attorney retained to directly appeal the Juvenile Court Order waiving jurisdiction over Respondent forfeited the issues which could have been raised in that appeal.

The cases cited by the District Court, *supra*, clearly establish that an appeal of the Juvenile Division's decision to waive jurisdiction *must* be taken directly to the County Circuit Court, or the appeal is forfeited. In *Mahone*, *supra*, the Michigan Court of Appeals discusses the predecessor statutes to the statutes which were in effect in 1986 and 1987, when Mr. Hatchett's case was before the Juvenile Court.

The more recent statutes are attached in the Respondent's Appendix, infra. However, the substance of these statues did not change. The Michigan Court of Appeals, in *Mahone*, supra., described the effect of those statues on the right to

appeal a Juvenile Court decision to waive jurisdiction in a juvenile delinquency case, as follows:

> Based on our reading of the above statutes, as well as the cited court rules, we hold that where, as here, a probate court waives jurisdiction over a juvenile in order that he be tried as an adult, the juvenile must first seek review of that decision in the circuit court before this Court will consider the question. Defendant advances no suitable reason why he should be allowed to circumvent the statutory scheme; he cites no cases where this Court exercised review on similar facts. *Cf., People v Bowers*, 54 Mich App 565, 566; 221 NW2d 472 (1974). Hence we refuse to engraft on the foregoing statues a judicial exception which would sap them of their force. [footnote omitted].
>
> Review by the circuit court, we believe, serves three salutary functions: (1) it permits consideration by a court in the same locale as the juvenile court, presumably a court more intimately familiar than are we with the available regional facilities for rehabilitation of juveniles, see MCL 712A.4(4)(d); MSA 27.3178(598.4)(4)(d) and JCR 1969, 11.1(B)(4); (2) it bears the potential that an erroneous waiver decision will be more speedily considered and reversed than is possible in this Court (thus ensuring that a minor over whom jurisdiction is mistakenly waived, will be returned quickly to juvenile rehabilitation); and (3) it provides the Court of Appeals with an analysis, independently undertaken, of the probate court's reasons for waiver. With these functions in mind, we conclude that defendant may not subvert the legislative plan.[1]

> 'We note, however, that a defendant who *does* invoke circuit-court review of a waiver order may, upon his later conviction, raise anew the propriety of waiver in his appeal of right before this Court. *See People v Schumacher*, 75 Mich App 505; 256 NW2d 39 (1977).... *Mahone*, *supra*, at 410-411. (emphasis added)

*Mahone*, is particularly important because it was decided in 1977, and is the applicable precedent that controlled at the time Mr. Hatchett's case was before the Juvenile Court. Further, as pointed out by the District Court, *supra*, the Michigan Court of Appeals reaffirmed *Mahone* in 1988 in *People v Jackson*, *supra*., an opinion which was handed down by the Michigan Court of Appeals approximately 1 and ½ years after the Juvenile Court waived jurisdiction over Mr. Hatchett. *Jackson* , *supra*, at 195-196, clearly states:

> This Court will not rule on the propriety of a waiver of jurisdiction by the probate court unless the juvenile first seeks review in the circuit court. The review procedure is governed by the statutes and court rules pertaining to appeals. *People v Mahone*, 75 Mich App 407, 410; 254 NW2d 907 (1977).
>
> GCR 1963, 701.2(a), now MCR 7.101(B)(1), provided for an appeal as of right to the circuit court from a probate court order if appeal was taken within twenty days of the entry date of the order (twenty-one days under the new rule). Where the twenty-day period had expired, the circuit court could grant leave to appeal if requested pursuant to GCR 1963, 701.2(c), 703.2, now MCR 7.101(B)(2), 7.103(B).

> Here, defendant appealed from the probate court's August 20, 1984, order waiving jurisdiction within the twenty-day time limitation of former GCR 1963, 701.2(a). However, defendant subsequently abandoned the appeal, which has been dismissed. Moreover, defendant never sought leave to appeal in the circuit court. Because no appeal has been pursued in the circuit court, this Court may not consider the propriety of the probate court's order waiving jurisdiction. [footnote omitted]

These principles are well settled in Michigan Law. Thus, in *People v Figlus*, 86 Mich App 552; 272 NW2d 722 (1978), the Michigan Court of Appeals refused to hear an appeal from a juvenile who was convicted in the adult felony court following a waiver of the Juvenile Court's jurisdiction, because of the failure of the defendant to take a direct appeal from the juvenile court decision. The Court stated: "no appeal from the probate court's decision to waive jurisdiction was taken in the Circuit Court [citations omitted]." Thus, the Michigan Court of Appeals refused to review the propriety of the Juvenile Court's decision to waive jurisdiction.

In another case, entitled: *In the Matter of Arthur C. Evans*, 99 Mich App 466; 297 NW2d 873 (1980), the Michigan Court of Appeals *did* review the propriety of the Juvenile Court's decision to waive jurisdiction over a juvenile accused of acts of delinquency, where the juvenile *did* timely challenge the waiver decision in the Wayne County Circuit Court, and where the Circuit Court in fact reversed the Judgment of the Juvenile Court. Upon consideration of the merits, the Michigan Court of Appeals reversed the Circuit Court's decision, and reinstated the Juvenile Court's decision to waive jurisdiction. [Note: undersigned counsel represented

juvenile, Arthur C. Evans, in the above case during the waiver of jurisdiction proceedings in the Juvenile Court.]

In *People v Billington*, 116 Mich App. 220; 323 NW2d 343 (1982), the Michigan Court of Appeals noted that the 1979 statutory changes did not alter the law in Michigan that a decision of the Juvenile Court to waive jurisdiction over a juvenile charged with delinquent acts is a final judgment which must be appealed directly to the county circuit court. *Billington*, *supra*, at 229-230, states as follows:

> There is no showing on the record that defendant's prior juvenile convictions were constitutionally infirm. Defendant admits that the waiver was not initially challenged in the circuit court on the present grounds. In *People v Mahone*, 75 Mich App 407; 254 NW2d 907 (1977), the Court held that where a probate court waives jurisdiction over a juvenile to try him as an adult, the juvenile must first seek review of that decision in the circuit court before this Court will consider the question. In *People v Figlus*, 86 Mich App 552; 272 NW2d 722 (1978), and in *Mahone*, this Court held that where the defendant did not invoke the circuit court's review of the probate court's decision to waive jurisdiction, defendant waived any challenge he might have had to the infirmity of the probate court proceedings.
>
> The above-cited cases in which the defendants were found to have waived any challenge to the infirmity of the probate court proceedings were all based upon MCL 712A.22, 701.45a; MSA 27.3178(598.22), 27.3178(45.1). These statutes have now been superseded by the Revised Judicature Act, specifically by MCL 600.863; MSA 27A.863, which states that a

> person aggrieved by a final order, sentence or judgment of a probate court may appeal from that order to the circuit court; appeal to this Court in a case of this type is by application and not as a matter of right. Leave to appeal not having been granted, this issue is not properly before this Court.

Finally, the seminal decision in Michigan setting forth, discussing, and applying the criteria which must be looked at to determine whether Juvenile Court jurisdiction is properly waived is *People v Jeffrey Dunbar*, 423 Mich 380; 377 N.W.2d 262 (1985), which opinion was handed down approximately two years before the Juvenile Court proceedings in Mr. Hatchett's case. [NOTE: undersigned counsel represented juvenile Jeffrey Dunbar during the waiver of jurisdiction proceedings in the Juvenile Court]. The *Jeffrey Dunbar* opinion summarized the appellate progress of that case, explaining how the appeal of the Juvenile Court decision to waive jurisdiction came before the Michigan Supreme Court. The Court stated as follows:

> Jurisdiction was waived in September, 1978, and defendant promptly appealed this determination. The circuit court did not decide the appeal until July, 1979, several months after defendant was tried and sentenced. The Court of Appeals affirmed the waiver order and the conviction two years later. *Jeffrey Dunbar*, *supra*, 423 Mich at 398, n. 8.

Thus, defendant Dunbar properly appealed the final judgment of the Juvenile Court to the Wayne Circuit Court, which ultimately affirmed the decision of the Juvenile Court to waive jurisdiction, although the circuit court did not issue its opinion until after defendant Dunbar had gone to trial in the Detroit Recorder's Court and been convicted of First

Degree Felony Murder. Both the Juvenile Court's Order waiving jurisdiction, and the murder conviction in the adult court, were appealed to the Michigan Court of Appeals, which rejected all claims for relief. The Michigan Supreme Court then granted leave to appeal, and ultimately issued its seminal opinion in Juvenile Law, and determined that the Juvenile Court had improperly waived its jurisdiction over Mr. Dunbar, and ordered his adult felony conviction vacated.

Similarly, in the instant case, the Order of the Juvenile Court waiving its jurisdiction over Respondent Darrin Hatchett was a final Order, which, under Michigan law, Mr. Hatchett had a right to appeal. Mr. Hatchett attempted to exercise his right of appeal. His family retained attorney Charles Campbell to both represent him on the pending charges in the Detroit Recorder's Court, and to appeal the decision of the Juvenile Court waiving jurisdiction over him.

However, as found by the District Court, Attorney Campbell never filed an appeal from the Juvenile Court Order in the Wayne Circuit Court. (District Court Opinion, Petitioner's Appendix, at 16a). Thus, it is not correct to say, as contended by Petitioner, that Attorney Roman Karwowski, who was assigned to represent Mr. Hatchet following his trial conviction in the Detroit Recorder's Court, could have challenged the Order of the Juvenile Court to waive jurisdiction. (Petition, at 10-11, 13). The time limits for an appeal of right from the Order of the Juvenile Court had expired by that time. Even if Attorney Karwowski had raised a challenge to the Juvenile Court's Order waiving jurisdiction in the Michigan Court of Appeals, the Michigan Court of Appeals would have refused to consider it, in light of Mr. Hatchett's failure to first take an appeal of right to the Wayne County Circuit Court. *Mahone*, *supra*, *Figlus, supra*, and *Jackson*, *supra*. Further, the Juvenile Court Order was not

issued by the Detroit Recorder's Court, which is the court which had appointed Mr. Karwowski to represent Mr. Hatchett; therefore an appeal of the Juvenile Court Order was outside the scope of the Order appointing Mr. Karwowski to represent Mr. Hatchett. In addition, since Mr. Karwowski had not been appointed by the Juvenile Court, the Juvenile Court would not have recognized his assignment as counsel for Mr. Hatchett, and would have refused to provide Mr. Karwowski with copies of the transcripts of the Juvenile Court hearings, or copies of documents in the Juvenile Court file, at court expense. Without access to the transcripts or records of the proceedings in the Juvenile Court, Mr. Karwowski, assigned by the Detroit Recorder's Court, would have been completely unable to mount any substantive challenge to the Juvenile Court's Order waiving jurisdiction over Mr. Hatchett.

**B. <u>The policies underlying *Roe v Flores-Ortega*, 528 U.S. 470 (2000) fully apply to this case, and logically lead to the same result.</u>**

The Petitioner erroneously presents this as a case of first impression. It is not, because, as determined by the Sixth Circuit, this case presents un uncontroversial and eminently logical application of the rule in *Flores-Ortega*, *supra*, to the final judgment of the Juvenile Court waiving jurisdiction over the Respondent. The Juvenile Court issued this Order following a contested hearing, involving the presentation of evidence, and arguments by counsel.

The complexity of the issues and arguments that can be appropriately raised in appeal from such a Juvenile Court Order is illustrated by the seminal opinion of the Michigan Supreme Court in *People v Jeffrey Dunbar*, 423 Mich 380, 385-86; 377 NW2d 262 (1985), which was the leading case in

Michigan concerning the waiver of juvenile court jurisdiction at the time of the Juvenile Court hearings in the instant case. In *Dunbar*, *supra*, the Michigan Supreme Court discussed at length the record of the testimony presented at the hearing before the Juvenile Court, and applied the legal standards which govern the decision to waive jurisdiction as established by Michigan law, to the facts as presented. The Opinion of the Michigan Supreme Court in *Dunbar* takes up 15 pages of the Michigan reporter. *Dunbar*, *supra.*, 423 Mich at 383-398. The dissenting opinion takes up 12 pages of the Michigan reporter. *Dunbar*, *supra*, 423 Mich at 398-410 (Dissenting Opinion of Boyle, J.). Thus, the issues which can be raised in such an appeal are many, and complex.

For these reasons, the policies underlying this Court's decision in *Roe v Flores-Ortega*, *supra*, fully apply to the instant case. In *Flores-Ortega*, *supra*, this Court clearly rejected any suggestion that a Habeas Petitioner, such as Mr. Hatchett, who has been deprived of his right to appeal by the ineffective assistance of appellate counsel, must articulate the arguments that would have been raised in such an appeal, had it been taken, or demonstrate a likelihood that the appeal would have probably been successful had it been properly and timely pursued. In *Roe v Flores-Ortega*, *supra*, this Court stated:

> Similarly, in *Rodriquez* [*v. United States*, 395 U.S. 327 (1969)], counsel failed to file a notice of appeal, despite being instructed by the defendant to do so. See *Rodriquez*, 395 U.S., at 328. We held that the defendant, by instructing counsel to perfect an appeal, objectively indicated his intent to appeal and was entitled to a new appeal without any further showing. Because "[t]hose whose right to an appeal has been frustrated should be treated exactly like any other

> appellan[t]," we rejected any requirement that the would-be appellant "specify the points he would raise were his right to appeal reinstated." *Id.*, at 330. See also *Evitts v Lucey*, 469 U.S. 387 (1985) (defendant entitled to new appeal when counsel's deficient failure to comply with mechanistic local court rules led to dismissal of first appeal).....

For these reasons, this Court reached the following conclusion in *Roe v Flores- Ortega*, *supra*:

> By the same token, although showing nonfrivolous grounds for appeal may give weight to the contention that the defendant would have appealed, a defendant's inability to "specify the points he would raise were his right to appeal reinstated," *Rodgriquez*, 395 U.S., at 330, will not foreclose the possibility that he can satisfy the prejudice requirement where there are other substantial reasons to believe that he would have appealed. See *ibid.*; see also *Peguero* [*v. United States*], 526 U.S. [23], at 30 [1999] (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding *pro se* in an initial [habeas] motion"). We similarly conclude here that it is unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal. Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed.

Mr. Hatchet has met the test set forth by this Court in *Roe v Flores-Ortega*, *supra*. The Opinion of the District Court clearly found that Mr. Hatchett has established that he wanted to appeal, and that in fact Attorney Charles Campbell was hired to pursue the appeal. (District Court Opinion, Petitioner's Appendix, at 8a-9a, 12a, 16a, 23a-24a). This aspect of the District Court's Opinion was upheld by the Sixth Circuit (Opinion of the Sixth Circuit, Petitioner's Appendix, at 3a, 5a, 6a-7a).

For these reasons, the Petitioner's argument that the Sixth Circuit erroneously applied the "presumed prejudice" standard of *Roe v Flores-Ortega*, *supra*, to this case, is off base. The Petitioner argues: "Here a record exists from which actual prejudice can be ascertained from that failure [to appeal the Juvenile Court's Order waiving jurisdiction]. (Petition, at 10). Contrary to this assertion, the issue presented in this case is no different from the issue presented to this Court in *Roe v Flores-Ortega*, where the Petitioner had lost his right to appeal his adult felony conviction because his attorney failed to file and pursue the appeal.

It is true that in the instant case, just as in *Flores-Ortega*, there are transcripts and court records available from which Mr. Hatchett could have attempted to, on his own, identify and articulate possible appeal issues which could have been raised in an appeal of right from the Juvenile Court decision waiving jurisdiction. However, in *Flores-Ortega*, this court decided as a matter of policy that a Habeas Petitioner should not be put into the position of trying to articulate the appellate issues, and establish that these issues would probably have resulted in a different outcome of the proceeding; this Court reached this decision based upon a recognition that the essence of the violation of the Petitioner's rights was the deprivation of a procedure, an appeal; an appeal which he

had a right to, but which he was deprived of altogether. Just as the Habeas Petitioner in *Flores-Ortega*, *supra*, had a right to have an appeal from the final judgement convicting him of certain crimes, so too did Mr. Hatchett have a right to appeal the final judgment of the Juvenile Court waiving jurisdiction over him to the adult court, where he would confront the full weight of substantially more severe penalties.

The Petitioner also implies that Mr. Hatchett does not have any meritorious grounds to present on appeal from the Order of the Juvenile Court waiving jurisdiction, by incorrectly asserting that Mr. Hatchett does not contest anything that transpired at either of the two hearings held in the Juvenile Court on January 20 and March 10, 1987, that resulted in the Juvenile Court Order waiving jurisdiction. (See Petition, at 3-4). To the contrary, Mr. Hatchett has numerous objections to the proceedings that took place in the Juvenile Court, but has not raised them in the course of these proceedings because he is not required establish that he has issues which will probably result in a different outcome. *Flores-Ortega*, *supra*. To show prejudice, all Mr. Hatchett must establish is that he was deprived of his right to appeal by the deficient performance of his counsel. The prejudice Mr. Hatchett must show, and has shown, is that he has been deprived of his right of appeal the Juvenile Court Order waiving jurisdiction to the Detroit Recorder's Court. Mr. Hatchett need not, at this stage of the proceedings, prove meritorious grounds for the appeal that could have been asserted had the appeal been taken in a timely fashion.

The Petitioner cites two cases as standing for the proposition that, to establish the prejudice prong of the ineffective assistance of counsel standard established by *Strickland v Washington*, 466 U.S. 668 (1984), where an appellate attorney fails to pursue an appeal from a Juvenile

Court Order waiving jurisdiction over a juvenile to an adult criminal court, a Petitioner must establish a reasonable probability that the appeal would have been successful. *Spytma v Howes*, 313 F3d 363, 372 (6th Cir. 2002); *Foster v Johnston*, 293 F3d 766, 789 (5th Cir. 2002)(See Petition at 12). However, for whatever reason, neither of these cases discusses, or even mentions the application of *Flores-Ortega*, *supra*, to the issue before it. Thus, neither case provides any insight as to why the court felt the issue presented for decision was not controlled by *Flores-Ortega*, *supra*. Therefore, neither of these cases establishes a rule of law which distinguishes the facts of those cases from the facts and holding of *Flores-Ortega*, *supra*. For the reasons stated, *Flores-Ortega* clearly applies here, and mandates affirmance of the Opinion of the Sixth Circuit.

**C. <u>The Order of the Juvenile Court waiving jurisdiction over Mr. Hatchett to the Detroit Recorder's Court is not analogous to an Order issued by a trial court following an evidentiary hearing on a defense motion to suppress certain evidence.</u>**

The Petitioner is also off base in trying to analogize the decision of the Juvenile Court to waive jurisdiction over Mr. Hatchett to the Detroit Recorder's Court to an Order following pretrial hearing by the trial court on a defense motion to suppress certain evidence. (Petition, at 10-13). The failure to take interlocutory review of pretrial decisions of the trial court regarding the suppression of evidence does not limit the ability of a convicted defendant to raise those same arguments on direct appeal from a trial court conviction. However, in this case, Attorney Campbell's failure to directly appeal to the Wayne Circuit Court the Juvenile Court Order waiving jurisdiction over Mr. Hatchett to the

Detroit Recorder's Court effectively deprived Mr. Hatchett of his right to appeal.

## CONCLUSION

The Sixth Circuit correctly applied this Court's ruling in *Roe v Flores-Ortega*, *supra.*, to the instant case, and correctly determined that Respondent Hatchet did not need to prove that his appeal from the Final Judgment of the Juvenile Court waiving jurisdiction over him to the Recorder's Court for the City of Detroit would have probably been successful; he need only demonstrate that he intended to appeal, that he retained an attorney to perfect his appeal from the Juvenile Court Order, and that the attorney never filed the appeal.

## RELIEF REQUESTED

Therefore, for all the above reasons, the Petition filed by the Michigan Attorney General for a Writ of Certiorari should be denied; or, in any event, the Judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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Dated: April 11, 2005

## APPENDIX A

### CHAPTER 600 REVISED JUDICATURE ACT OF 1961
### REVISED JUDICATURE ACT OF 1961
### CHAPTER 8. PROBATE COURTS
### MCL § 600.861

§ 600.861; MSA 27A.861. Appeals to court of appeals

Sec. 861. A party to a proceeding in the probate court may appeal the following orders as a matter of right to the court of appeals:

(a) A final order affecting the rights or interests of any interested person in an estate or trust.

(b) An order entered in an adoption proceeding under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, and appealed in accordance with section 65 of chapter X of Act No. 288 of the Public Acts of 1939, being section 710.65 of the Michigan Compiled Laws.

(c) The following final orders entered by the juvenile division of the probate court:

(i) An order of disposition placing a child under the supervision of the court or removing the child from his or her home.

(ii) An order terminating parental rights.

(d) A final order in a condemnation case entered under the drain code of 1956, Act No. 40 of the Public Acts of 1956, being sections 280.1 to 280.630 of the Michigan Compiled Laws.

Amended by P.A. 1982, No. 318, § 1, Imd. Eff. Oct. 18, 1982.

## APPENDIX B

## MCL § 600.863

§ 600.863; MSA 27A.863 Appeals to circuit court

Sec. 863. (1) Except when prohibited by statute, a person aggrieved by an order, sentence, or judgment of the probate court, other than an order appealable under section 861, may appeal from that order, sentence, or judgment to the circuit court in the county in which the order, sentence, or judgment is rendered. An interlocutory appeal under this subsection shall be by application and not as a matter of right.

(2) An appeal to the court of appeals from a judgment entered by the circuit court on an appeal from the probate court under subsection (1) shall be by application.

(3) Instead of appeal under subsection (1), a party may appeal directly to the court of appeals upon certification of the issue or issues by the probate judge. An appeal under this subsection shall be by application and not as a matter of right.

## APPENDIX C

### MCL § 600.866

§ 600.866; MSA 27A.866. Appeal on record

Sec. 866. (1) All appeals from the probate court shall be on a written transcript of the record made in the probate court or on a record settled and agreed to by the parties and approved by the court. An appeal shall not be tried de novo.

(2) Notice of appeal shall be given to all interested parties as provided by supreme court rule.

(3) Except as otherwise provided in sections 861 to 867, appeals from the probate court or a judge thereof shall be governed by supreme court rule.